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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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# No. 781

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NEUMATICOS GOODYEAR S.A.,
*Petitioner,*

*vs.*

THE UNITED STATES,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

# No. 781

NEUMATICOS GOODYEAR S.A.,
*Petitioner,*

*vs.*

THE UNITED STATES,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Neumaticos Goodyear S.A., the petitioner herein, prays that a writ of certiorari issue to the Court of Claims of the United States to review a judgment entered by that court in the above-entitled cause on November 3, 1947.

### Findings and Opinion Below

This cause originated with the filing of a petition (R. 1) to recover just compensation for rubber owned by petitioner which was requisitioned by the Board of Economic Warfare.

After hearings before a Commissioner of the Court of Claims, the Commissioner submitted a report of his findings of fact and conclusions of law in which he rejected the petitioner's claim for $876,806.78, plus interest, and instead allowed a fair value of $434,146.14, plus interest, as just compensation for the 1,948,459½ pounds of requisitioned rubber. Exceptions to this report were filed by both the petitioner and the respondent. After argument before the Court of Claims, it handed down its decision from which this appeal is taken (R. 16-34; 73 F. Supp. 969), increasing the award slightly to $463,361.19.

## Jurisdictional Statement

The jurisdiction of this Court is invoked under the Act of February 13, 1925, c. 229 § 3, 43 Stat. 939, U.S.C. Title 28, § 288.

## Statute Involved

This case arises under that part of the Fifth Amendment to the Constitution which provides that private property shall not be taken for public use without just compensation, and the Act of October 10, 1940, c. 836, 54 Stat. 1090, as amended by the Act of July 2, 1942, c. 471, § 1, 56 Stat. 467, 50 U.S.C. App. §§ 711 and 712 (Supp. 1946). The relevant portions of the latter statute are set forth in an appendix to the brief in support of this petition. The jurisdiction of the Court of Claims was also based upon § 145 of the Judicial Code (Act of March 3, 1911, c. 231, § 145, 36 Stat. 1136, as amended by the Act of June 10, 1921, c. 18, § 304, 42 Stat. 24, 28 U.S.C. § 250).

## Summary Statement of the Case

This case involves a novel interpretation of a basic constitutional provision. The important issue thus raised, however, as is frequently true, is cloaked in facts and in an ultimate question which can be stated very simply.

That question is whether, under the Constitution and the decisions of this Court, the petitioner is entitled as just compensation to the full and perfect equivalent in money of the requisitioned rubber.

The difference between the two positions in this case is the difference between a value of approximately 22½¢ per pounds and a value of 45¢ per pound for rubber. That difference does not depend merely upon how much weight is to be given to numerous complicated facts. On the contrary, that difference depends upon whether a novel interpretation of the Fifth Amendment may be embarked upon by the lower courts without the sanction of this Court.

The important facts of this case are relatively few. In January, 1942, petitioner purchased in Ceylon the rubber which was subsequently requisitioned. This rubber was shipped from Colombo, Ceylon, to Buenos Aires, by way of New York, but inability to obtain the appropriate United States export license made transshipment at New York impossible. On July 29, 1942, after this rubber had been removed from shipboard and stored in New York, it was requisitioned.

In rejecting petitioner's claim of 45¢ per pound for the rubber and allowing instead only 22½¢ per pound, plus costs and interest, the court below has proceeded on a theory which substantially deprives petitioner of its right to just compensation.

The only basis suggested by the court below in support of its decision is the cost to the petitioner of acquiring this rubber in the Far East long before the requisitioning date and, more significantly, before the Japanese seizure of Far Eastern rubber sources representing 90% of the world's crude rubber supply. The court attempts to buttress this decision by reference to one further fact, namely, that 23.3¢ per pound is the average of all prices paid by Rubber Reserve Company in acquiring surplus and undelivered

stocks of rubber in 1942. This average price, however, is a mere abstraction. It results from widely different prices, paid in numerous transactions, involving a wide variety of grades of rubber; and in each instance the price was fixed, not as the result of free negotiation, but at the seller's cost at whatever date he acquired the rubber and wherever it was acquired.

The grounds of decision by the court below represent a departure from the standards heretofore applied by this Court in interpreting the Fifth Amendment.

This novel basis of determining just compensation is of importance not only in the instant case but also in numerous other cases arising from requisitionings during the war. It is of even more compelling significance because of its applicability to property of nationals of foreign countries. Decisions in these cases go beyond the important question of what the individual shall receive for property which has been taken and, in addition, affect vitally the atmosphere in which critical and delicately balanced international relations must be maintained.

## Questions Presented and Specification of Errors

The questions presented can be stated as whether or not the Court of Claims erred in connection with the assigned errors which are intended to be urged and which are as follows:

1. It is not entirely clear whether "just compensation," as determined by the court below, is either (a) the cost to the petitioner, in the Far East and under vastly different conditions, of acquiring the rubber which was subsequently requisitioned, plus a "reasonable" allowance for freight and profit, or (b) a fictitious value representing a mere arithmetical average of a wide scale of prices paid by Rubber Reserve Company during 1942 in acquiring an aggregate of over 52,000,000 pounds of rubber in many unrelated transactions,

involving rubber of a variety of qualities (see Opinion, R. 34). The court erred, however, in determining just compensation upon either such theory of value.

2. The court erred in determining just compensation without giving weight to the only relevant criteria of value represented by prices arising from freely negotiated purchases and sales of crude rubber. Specifically, the court did not give weight to:

(a) the prices paid by Government corporations in buying rubber of comparable quality in the Latin American market at the time of requisitioning;

(b) the prices which were paid in the free market for rubber of comparable quality in New York—the place of requisitioning—shortly prior to the time thereof;

(c) the price of 40¢ per pound thereafter charged by Rubber Reserve Company for rubber which went into governmental use (although the 22½¢ fiat price for civilian use was still maintained unchanged);

(d) the prices of 53¢ per pound and higher exacted by Rubber Reserve Company for rubber of identical quality in sales thereof to the Latin American market when such sales were commenced within a year of this requisitioning; and

(e) the replacement cost to the petitioner of the requisitioned rubber in so far as the petitioner was able to replace it.

All such criteria point to a price of 45¢ per pound or more.

3. The court erred in failing to overrule its Commissioner for excluding evidence of the fact that Rubber Reserve Company itself charged 40¢ per pound for rubber which was not destined for the civilian market. This evidence, in the absence of a free market at the time and place of taking, was relevant and material and should have been given weight by the court instead of being ignored as indicated in clause (c) above.

4. The court erred in failing to overrule its Commissioner for excluding evidence of the prices charged by Rubber Reserve Company itself in sales of crude rubber to Latin American countries. This evidence, in the absence of a free market at the time and place of taking, was relevant and material and should have been given weight by the court instead of being ignored as indicated in clause (d) above.

5. The court erred in refusing to certify as part of the record in this case certain exhibits which were marked for identification, offered in evidence by petitioner and which were wrongfully excluded by the Commissioner for the Court of Claims. Exception was duly taken by the petitioner to these adverse rulings by the Commissioner, but notwithstanding the undeniable relevance of these exhibits to the questions presented by this petition, the court below denied petitioner's application even to have such exhibits included in this record. The exhibits in question are Plaintiff's Exhibits 9-C, 12, 27, and 28 for identification.

## Reason for Allowance of the Writ

There is just one reason why this petition for a writ should be granted, but it is an important one. The court below has embarked upon a novel and extraordinary interpretation of one of the most basic and frequently invoked provisions of our Constitution. In doing so, it has cited no decision of this Court as being either directly applicable or applicable by analogy. Indeed it could cite no such decision.

If the "just compensation" which is guaranteed by our Constitution when private property is taken is to receive a new and different meaning, that meaning should be established by this Court.

## Conclusion

WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court directed to the Court of Claims of the United States, to the end that the above cause may be certified to and reviewed and determined by this Court, and the judgment of the Court of Claims in the above-entitled cause may be reviewed by this Court, and your petitioner prays for such other and further relief as this Court may deem just and proper.

Dated: New York, N. Y., May 3, 1948.

DANIEL JAMES,
*Counsel for Petitioner.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

---

# No. 781

---

NEUMATICOS GOODYEAR S. A.,
*Petitioner,*

*against*

THE UNITED STATES,
*Respondent*

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

### Opinions Below

The opinion of the Court of Claims was entered on November 3, 1947, and is reported in 73 F. Supp. 969 but has not yet been officially reported. A true copy is in the record (R. 16-34).

### Jurisdiction

A statement of the constitutional, statutory and other grounds upon which the jurisdiction of this Court is invoked is contained in the Petition under the heading "Jurisdictional Statement" and, to avoid duplication, is not repeated here.

## Statement of Case

A statement of the case is set forth in the Petition under the heading "Summary Statement of the Case" and, to avoid duplication, is not repeated here.

## Specification of Errors

A statement of the assigned errors which are intended to be urged and the questions presented thereby is contained in the Petition under the heading "Questions Presented and Specification of Errors" and, to avoid duplication, is not repeated here.

## Summary of Argument

Basically, the Court of Claims has in this case determined just compensation upon one or the other of two alternative theories, either of which represents a departure from those standards of just compensation which have heretofore received the sanction of the Supreme Court:

These theories are that:

(a) the cost to the petitioner of acquiring the requisitioned rubber determines the compensation to which petitioner is entitled, or

(b) the average purchase price paid by the Rubber Reserve Company under its so-called "Surplus Stocks Program" is the proper measure of just compensation.

On neither theory does the petitioner receive what it is entitled to receive—the full and perfect equivalent in money of the requisitioned rubber.

## I

### Cost to Petitioner as a Measure of Compensation

If the decision by the Court of Claims is based upon the cost to petitioner of acquiring the rubber which was requisitioned by the respondent, then the decision should plainly be corrected for error of law.

*Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106, 123.

This and cognate cases show that the owner's cost of acquisition, as a matter of law, is not the measure of just compensation.

In the present case, furthermore, the petitioner's cost is particularly unsuitable to measure fairly the amount of just compensation. That cost was incurred not in New York—the place of requisitioning—or even the Western Hemisphere, but in the Far East; and not at the time of requisitioning or even during a comparable time, but months prior to the requisitioning and before the Japanese had overrun the Far East, thus sealing off from access areas supplying ninety per cent of the world's crude rubber supply.

Time does not flow evenly, but its rate of passage is determined by events. In terms of events in the rubber market, the date when the petitioner acquired its rubber in the Far East was extremely remote from the date of requisition—far more remote than the dates of the transactions referred to in Items 3 and 4 of the Specification of Errors, evidence of which was excluded by the Court of Claims.

## II

### Average of Prices Paid by Rubber Reserve Company as Measure of Compensation

It may be that the decision of the Court of Claims determining the compensation to which petitioner is entitled is intended to be based upon an average of the various prices paid by Rubber Reserve Company, a Government agency, in connection with its "Surplus Stocks Program." In its brief in support of a motion for new trial in the Court of Claims, the respondent states:

> "The defendant [the United States] does not object to the Court's determination that the buying price (or formula) established by Rubber Reserve Company under its so-called 'Surplus Stocks Program,' is the proper measure of compensation."

If the award of just compensation to petitioner by the Court of Claims is based upon the average of the prices paid by Rubber Reserve Company, then that decision is in error for two reasons. In the first place, the price relied upon by the Court of Claims, 23.3¢ per pound, is a mere statistical fiction which was probably never actually paid by Rubber Reserve Company in any particular purchase. This 23.3¢ is an average of various prices paid by Rubber Reserve Company for different grades of rubber in numerous transactions extending throughout the entire year 1942 (R. 34, 36). Even omitting the grade or quality factor, it is not clear whether the 23.3¢ was weighted to give significance to the prices at which the greatest quantities of rubber were purchased by Rubber Reserve Company, or whether 23.3¢ is a simple arithmetical average arrived at by adding together all of the different prices paid in all of the transactions for the year 1942 and dividing this sum by the number of separate transactions. In either case, we know

of no support in judicial authority or logic for making any such determination and using a figure thus determined as the measure of just compensation.

In the second place, the average in question is not an average of prices established by normal purchases and sales made in a free market. The 23.3¢ is an average of prices established in sales to Rubber Reserve Company which, as a result of Government regulations, became the only person or corporation to whom sales of rubber could lawfully be made. In addition, the prices paid by Rubber Reserve Company for substantially all the rubber which it purchased were not even arrived at through the normal bargaining process. On the contrary, these prices were instead simply the aggregate of the seller's costs which the Rubber Reserve Company decided were fair and for which the Rubber Reserve Company decided to reimburse the seller (R. 49-50). The price paid in each purchase by Rubber Reserve Company reflected nothing more than a unilateral determination by this quasi-government agency of what acquisition and transportation costs each seller was entitled to receive reimbursement for. A price so established cannot be accepted as the equivalent of a price which would be paid by a buyer who was under no particular compulsion to buy to a seller who was under no particular compulsion to sell—the fair market price.

One fact is clear, irrespective of whether the "compensation" awarded by the Court of Claims to petitioner was based on the cost to petitioner of the rubber requisitioned or was based upon the average of the prices paid by Rubber Reserve Company during the year in which the requisition occurred. That fact is that on neither theory does the petitioner receive the full and perfect equivalent in money of the requisitioned rubber.

*United States* v. *Miller*, 317 U. S. 369, 373.

In conclusion, the petitioner desires to call this Court's particular attention to two inadvertent misstatements in the findings and opinion of the Court of Claims which might otherwise obscure the significance of the facts therein referred to.

Finding 18 implies that *all* the purchases of Latin American rubber in New York during 1942 are there set forth. The opinion (R. 32) implies that the table in Finding 17 shows *all* the sales of Latin American rubber in New York from January 2 through January 31, 1942. These implications are not correct and are not supported by anything in the record. These mistakes were not corrected by the Court of Claims although they were specifically directed to that Court's attention by the petitioner's motion for new trial.

The tables are merely a convenient statement of such purchases and sales in the New York market as are set forth in the record. There was no means of acquiring complete information as to *all* transactions. The transactions in the record are a substantial sampling, and there is nothing to indicate that they are not entirely representative of all free transactions in rubber in New York shortly prior to the requisitioning.

The true significance of the figures set forth in these tables, which was apparently overlooked by the Court of Claims, is that the prices paid in a representative sampling of those purchases and sales which were freely negotiated within a few months of the requisitioning date, were 45¢ and 46¢ per pound. Forty-five cents per pound is the amount claimed in this case.

## Conclusion

For the reasons set forth above and in the attached petition, the petitioner requests that this Court grant certiorari in order to correct the matters above referred to.

Respectfully submitted,

DANIEL JAMES,
*Counsel for Petitioner.*

A. E. FIRESTONE,

ROBERT G. ZELLER,
*Of Counsel.*

## EXHIBIT A

Act. Oct. 10, 1940, C. 836, 54 Stat. 1090

*§ 711. Requisition for United States of Export Military Materials*

Whenever the President determines that it is necessary in the interest of national defense or prosecution of war to requisition and take over for the use or operation by the United States or in its interest any military or naval equipment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies necessary for the manufacture, servicing, or operation thereof, ordered, manufactured, procured, or possessed for export purposes, the exportation of which has been prohibited or curtailed in accordance with the provisions of section 6 of the Act approved July 2, 1940 (Public, Numbered 703, Seventy-sixth Congress; 54 Stat. 714 [section 701 of this Appendix]), as heretofore or hereafter amended, or any other law, he is hereby authorized and empowered to requisition and take over for the said use or operation by the United States, or in its interest, any of the foregoing articles or materials, and to sell or otherwise dispose of any such articles or materials, or any portion thereof, to a person or a corporation of the United States whenever he shall determine such action to be in the public interest. Any moneys received by the United States as the proceeds of any such sale or other disposition of any such articles or materials or any portion thereof shall be deposited to the credit of that appropriation out of which was paid the cost to the Government of the property thus sold or disposed of, and the same shall immediately become available for the purposes named in the original appropriation: *Provided, however,* That nothing in this section shall modify or repeal section 14 of Public Law Numbered 671, 76th Congress, approved June 28, 1940 (sections 1262a of Title 10, and 546e of Title 34). Oct. 10, 1940, c. 836, § 1, 54 Stat. 1090, as amended July 2, 1942, c. 471, § 1, 56 Stat. 467.

### § 712. *Compensation for Appropriated Materials*

Whenever the President shall requisition and take over any article or material pursuant to the provisions of this Act, the owner thereof shall be paid as compensation therefor such sum as the President shall determine to be fair and just. If any such owner is unwilling to accept, as full and complete compensation for such article or material, the sum so determined by the President, such owner shall be paid 50 per centum of the sum so determined by the President and shall be entitled to sue the United States for such additional sum as, when added to the sum already received by such owner, such owner may consider fair and just compensation for such article or material, in the manner provided by sections 41 (20) and 250, Title 28, of the Code of Laws of the United States of America: *Provided,* That recovery shall be confined to the fair market value of such article or material, without any allowance for prospective profits, punitive or other damages. Oct. 10, 1940, c. 836, § 2, 54 Stat. 1091.

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THE UNITED STATES.

## BRIEF IN OPPOSITION TO GOVERNMENT'S SUGGESTION THAT PETITION FOR WRIT OF CERTIORARI WAS FILED OUT OF TIME.

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## BRIEF IN OPPOSITION TO GOVERNMENT'S SUGGESTION THAT PETITION FOR WRIT OF CERTIORARI WAS FILED OUT OF TIME.

### Question Presented.

This brief is addressed to the single issue presented by the Government's Suggestion herein dated May 20, 1948, that the petition for a writ of certiorari was filed out of time.

The applicable statute* provides that no writ of certiorari to bring a judgment or decree before this Court shall be allowed unless application therefor be made "within three months after the entry of such judgment or decree." The judgment of the Court of Claims in this case was entered February 2, 1948. May 2, 1948, was a Sunday, and the petition for a writ of certiorari was filed in this Court on Monday, May 3, 1948.

* Act of Sept. 6, 1916, c. 448, § 6, 39 Stat. 727; Feb. 13, 1925, c. 229, § 8 [a, b, d], 43 Stat. 940; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926; Proc. No. 2695, July 4, 1946, 11 F. R. 7517, 60 Stat. 1352; U. S. C. Title 28, § 350.

## Summary of Argument.

In communicating to counsel this Court's permission to file this brief, the Clerk of this Court called the attention of the petitioner to the *per curiam* opinion in *Gotham Can Co.* v. *United States,* 281 U. S. 706, where a petition was dismissed as not having been filed in time. That case, however, is the only one we have found which involved a final Sunday in the period for filing a certiorari petition. In its result, it is contrary to all expressions by this Court, either in opinions or pursuant to its rule-making power, on the question of the effect of a final Sunday in a prescribed period of time.

The *Gotham Can* case contains no express statement on this problem; its significance can be ascertained only by resort to the record and briefs. Moreover, the brief of the petitioner in the *Gotham Can* case does not even touch the effect of a final day being a *dies non.*

The problem is one of statutory interpretation, upon which the overwhelming majority of the courts and court rules are contrary to the *Gotham Can* case, as we will show below. No rule or opinion of this Court has ever expressly announced that the usual rule as to computation of time with respect to a final Sunday in a prescribed period will not be followed in determining the timeliness of petitions for writs of certiorari. On the contrary, the earlier opinions of this Court are such as to indicate that this Court would hold, on facts such as those presented in the *Gotham Can* case and in this case, that the petition for the writ of certiorari was timely filed. We submit, therefore, that the *Gotham Can* case was incorrectly decided and that it should be overruled.

There is only one significant social or legal interest involved here. That is the interest in procedural uniformity and the furthering of substantive justice which uniform procedure promotes. Diversity in the treatment of procedural matters which are neutral in their substantive aspects creates unnecessary pitfalls in the administration of the law.

The vast majority of federal and state courts and federal administrative agencies follow the practice of excluding a final Sunday in the computation of a period of time within which appeals may be perfected, pleadings filed and the like, thus allowing any required act or proceeding in such a situation to be taken on the following Monday. It is, therefore, urged that this Court announce and establish a similar rule of construction with respect to the period for filing petitions for writs of certiorari.

## POINT I.

**The *Gotham Can* case was decided inconsistently with controlling decisions of this Court and should therefore be overruled.**

This Court on several occasions prior to the decision of the *Gotham Can* case held that where action was required by statute to be taken within a certain period of time, and the period expired on a Sunday, the action could be taken on the next succeeding Monday.

*Street* v. *United States*, 133 U. S. 299, 306;
*Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 55-56.

This Court had also followed a similar practice under its rule-making power prior to the decision in the *Gotham Can* case.

> Rules of Practice for the Courts of Equity of the United States, Rule 80 (226 U. S. 673).

This Court continued to follow that practice thereafter.

> Rules and Forms in Criminal Cases, Rule XIII (292 U. S. 661, 666).

In *Street* v. *United States, supra,* the claimant was an Army officer who, by order of the President, was transferred to the list of supernumeraries on January 2, 1871, and thereafter mustered out of service. The claimant brought suit to recover salary subsequent to that date on the theory that he had not been legally mustered out. Under the statute in question, the President could muster out only those who were on the list of supernumeraries on January 1, 1871. It was argued, therefore, that the transfer of the claimant to such list on January 2nd, and his subsequent mustering out, was not authorized by the terms of the statute.

In holding that the claimed illegality did not exist, this Court stated (p. 306):

> "Again, it must be noticed that the first day of January was Sunday, that is, a *dies non,* and a power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day."

*Monroe Cattle Co.* v. *Becker, supra,* involved a statute of the State of Texas allowing ninety days within which a purchaser of school lands could make his first payment, and providing that no other person could make an applica-

tion for such lands until the first payment was in default. This Court stated (pp. 55-56):

> "As the ninetieth day fell on Sunday, the lands were not open to another application until Monday, the general rule being that, when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation. Endlich on Statutes, §393; *Salter* v. *Burt*, 20 Wend. 205; *Hammond* v. *American Life Ins. Co.*, 10 Gray, 306."

In contrast to these decisions and the rules of this Court cited above, it was held, *per curiam*, in the *Gotham Can* case that the petition for a writ of certiorari had not been filed within the time allowed, although the respect in which the petition was not timely is not stated in the opinion. Resort to the record discloses that the judgment to which the petition was addressed was entered on January 20, 1930. April 20, 1930, fell on a Sunday, and the petition for certiorari was filed on April 21, 1930.

Only one sentence in the petitioner's brief was directed to the question whether the petition had been timely filed. That sentence (Brief, p. 5) was: "The petitioner submits that under the rule laid down in *Sheets* v. *Selden's Lessee* (2 Wall. 177, 190) the time within which application for the writ could properly be made would not begin to run until January 21, 1930." This, of course, was demurrable. Admitting it, the petitioner was not helped.

The attention of this Court was not called to the cases cited above, to Equity Rule 80, nor to the fact that the statute governing the time within which petitions for certiorari must be filed was enacted by Congress against the background of these decisions by this Court.

The *Gotham Can* case should, therefore, be overruled.

## POINT II.

**The Rules of Civil Procedure and the Rules of Criminal Procedure for District Courts of the United States have generalized the practice of excluding a final Sunday in the computation of time, and while not controlling as such on this Court, this practice should be followed in the absence of a compelling reason to the contrary.**

Rule 6(a) of the Rules of Civil Procedure provides that in computing any period of time prescribed or allowed by those rules, by order of court, or by any applicable statute, the last day of the period is to be included "unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday." Rule 45(a) of the Rules of Criminal Procedure is identical in language.

The Committee on the Rules of Civil Procedure stated in its notes that Rule 6(a) was adopted as an amplification "along lines common in state practices" and in certain other jurisdictions cited in the note. Similarly, the Committee on the Rules of Criminal Procedure recommended the adoption of Rule 45(a) as "an adaptation" of Rule 6 of the Rules of Civil Procedure, thus recognizing the interest in uniformity on this matter.

The effect of the promulgation of these rules was to extend the method of computing time therein prescribed to every corner of the land, so that every lawyer, wherever located, in his initial contact with the federal courts becomes familiar with practice as set forth in these rules. Moreover, as is shown below, the method of computing time provided by these rules is in all probability a reiteration of the state practice with which he is familiar. It is

clearly in line with his experience before federal administrative bodies. It is also in line with his experience before federal courts other than the district courts.

Under these circumstances, to construe the certiorari statute as not permitting an additional day when the final day is a *dies non juridicus* would create a trap of the most vicious nature. Such an exceptional interpretation should not be indulged in unless expressly required by the statutory language or unless required by compelling considerations and accompanied by a warning which makes known to all that the rules of the game have changed. None of these factors is present here.

## POINT III.

**Recent decisions and rules of other Federal Courts and Federal Administrative Agencies unanimously exclude a final Sunday in the computation of time, and this is also the practice in the overwhelming majority of States.**

### Recent Decisions.

In *Sherwood Bros. Inc.* v. *District of Columbia,* 113 F. 2d 162 (App. D. C. 1940), the question presented was whether the petitioner had filed a claim for refund of taxes "within ninety days after notice of such assessment," as specified by the statute. The ninetieth day of the statutory period fell on Sunday, and the claim was filed on the following Monday. The claim was held to have been filed within the statutory period. The opinion of the court was written by Justice Rutledge and concurred in by Justice Vinson, Justice Stephens dissenting. Justice Rutledge's opinion states (pp. 163-164):

> "Business practice and accepted legal principle, apart from statute, permit and in some instances require an act to be done on the following Monday where the last day upon which it should have been

done falls on Sunday. That is the common-law rule, and it has become embedded in the habits and customs of the community, both from respect for religious considerations and by long-established legal and commercial tradition. It would be reasonable, therefore, to assume that Congress had the common-law rule in mind when it legislated, and to construe the statute accordingly. Various state courts have interpreted state temporal statutes in this manner. Many states have enacted statutes for computation of time which expressly exclude the final Sunday. The Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, do likewise. Rule 6 (a). And the only decisions of the Supreme Court bearing on the problem which have come to our attention follow the same rule. Street v. United States, 1890, 133 U. S. 299, 10 S. Ct. 309, 33 L. Ed. 631; Monroe Cattle Co. v. Becker, 1893, 147 U. S. 47, 13 S. Ct. 217, 37 L. Ed. 72."

In concluding that the final Sunday should be excluded from the computation of time, the court stated (p. 165):

> "It does not appear that time is of such essence in regard to these claims that any rightful interest of the Government will be prejudiced by excluding the final Sunday when the last day falls on Sunday. On the other hand, so doing will make the statutory period operate with greater uniformity both in coordination with the courts and among claimants; accord with settled business practice; and avoid the trap which is inherent in the opposite rule."

See also *Wilson* v. *Southern Railway Co.*, 147 F. 2d 165 (C. C. A. 5th 1945), where a similar result was reached under the statute limiting the time within which appeals may be taken from the district courts to the circuit courts of appeals. Like the certiorari statute, the appeal statute

(28 U. S. C. §230) provides that no such appeal shall be allowed "unless application therefor be duly made within three months" after the entry of the judgment appealed from. A notice of appeal was there held to have been timely filed when it was filed on a Monday following the final Sunday in an appeal period.

Accord, *Jordan* v. *Palo Verde Irrigation District,* 105 F. 2d 601, 603 (C. C. A. 9th 1939).*

Unless this Court follows the rule which it has approved for the district courts, of not counting a final Sunday in computing a period of time, difficulties and inconsistencies would seem inevitable in those cases where direct appeals from the district courts to this Court are permitted. For example, with respect to the direct appeals from district courts dealt with by Rule 36 of this Court, a district judge would have power, under Rule 6(a) of the Rules of Civil Procedure, to allow an appeal on a Monday following a final Sunday in the period for taking the appeal, whereas a Justice of this Court would be powerless to do so, although he would be acting within the identical statutory time limitation.

**Rules of Other Federal Courts.**

Those other federal courts which have adopted rules dealing specifically with this problem have all followed the practice of excluding the last Sunday in the computation of a period of time.

United States Circuit Court of Appeals for the Seventh Circuit, Rule 29(3);

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* A decision in the Ninth Circuit, long prior to the adoption of the Rules of Civil Procedure and the Rules of Criminal Procedure for District Courts, was the other way. *Meyer* v. *Hot Springs Imp. Co.,* 169 Fed. 628 (1909). There are early cases in certain other circuits in accord with the *Meyer* case. See *Walters* v. *Baltimore & O. R. Co.,* 76 F. 2d 599 (C. C. A. 3rd 1935) and cases cited therein.

United States Court of Appeals for the District of Columbia, Rule 32(a);
United States Emergency Court of Appeals, Rule 22(a);
The Court of Claims of the United States, Rule 98(a);
United States Court of Customs and Patent Appeals, Rule 9;
The United States Tax Court, Rule 61.

**Rules of Federal Administrative Bodies.**

Federal administrative bodies which have adopted rules on the problem here involved seem to be uniform in not counting a final Sunday or holiday in a prescribed period of time.

Department of Agriculture:

Rules of Practice under the Commodity Exchange Act, Rule 0.72(f);
Rules of Practice under Packers and Stockyards Act, Rule 202.22(f);
Rules of Practice under Perishable Agricultural Commodities Act, Rule 47.25(d);
Federal Communications Commission, Rules Relating to Organization and Practice and Procedure, Rule 1.703;
Federal Power Commission, General Rules of Practice and Procedure, Rule 1.13(a);
Interstate Commerce Commission, Rules of Practice, Rule 21(a);
National Labor Relations Board, Rules and Regulations, Series 5, Rule 203.86;
Patent Office:

Rules of Practice in the United States Patent Office, Rule 31;
Rules of Practice in Trademark Cases, Rule 1.6;

Securities and Exchange Commission, Rules of Practice, Rule 201.13(d).

**State Statutes, Rules and Decisions.**

Forty-four of the forty-eight states of the United States also follow the practice of excluding a final Sunday in the computation of a period of time in situations analogous to this.

Code of Alabama (1940), Vol. I, Tit. I, § 12;
Arizona Code Ann. (1939), Vol. 1, § 1-102;
Arkansas: *McNutt* v. *State,* 163 Ark. 122, 259 S. W. 1 (1924);*
Deering's Code of Civil Procedure of California (1941), §§ 12, 13;
1935 Colorado Stat. Ann., Vol. 3, Ch. 79, § 1;
Connecticut: *Sommers* v. *Adelman,* 90 Conn. 713, 99 Atl. 50 (1916);
Delaware: *Simkin* v. *Cole,* 32 Del. (2 W. W. Harr.) 271, 122 Atl. 191 (Del. Super. 1922);
Florida Stat. Ann., Vol. 19, § 683.01;
Code of Georgia of 1933, §§ 6-103 and 102-102(8);
Idaho Code Ann. (1932), Vol. 3, § 70-109;
Illinois Rev. Stat. 1947 (State Bar Ass'n Ed.), Ch. 131, § 1.11;
Burns' Indiana Stat. Ann. (1933, 1946 Replacement), Vol. 2, § 2-4704;
Code of Iowa (1946), Vol. 1, Ch. 5, § 4.1(23);
General Statutes of Kansas, 1935 (Supp. 1947), §§60-3819, 60-3819a;
Baldwin's Rev. Stat. of Kentucky (1942), § 446.030;
Louisiana: *Hendren* v. *Crescent City Seltzer and Mineral Water Co., Inc.,* 1 La. App. 25 (1924);

* *Cf. Clark* v. *American Exchange Trust Co.,* 189 Ark. 717, 74 S. W. 2d 974 (1934). Arkansas and New York appear to apply the rule of excluding a final Sunday in the computation of a period of time only where the period is expressed in terms of days. At least in New York, however, times to appeal are measured in terms of days, so that the result reached is the same as that here advocated. See 6 Carmody's New York Practice (2 ed. 1934) §§ 106, 107.

Rev. Stat. of Maine (1944), Vol. I, Ch. 98, § 4;
Michie's Ann. Laws of Massachusetts (1944), Vol. 1, Ch. 4, § 9; Vol. 7, Ch. 220, § 6;
Minnesota Stat. Ann. (1946), Vol. 42, § 645.15;
Mississippi Code Ann. (1942), Vol. 1, § 705;
Missouri Rev. Stat. Ann. (1942), Vol. 2, § 655;
Rev. Code Montana Ann. (1935), Vol. 1, §§ 10, 12;
Nebraska Revised Statutes (1943), Vol. 2, § 25-2221;
Nevada Comp. Laws (1929), Vol. IV, §§ 9029, 9408;
New Jersey: *State ex rel. Von de Place* v. *Weller*, 64 N. J. Law 155, 44 Atl. 874 (N. J. Supp. 1899);
New Mexico Stat. Ann. (1941), Vol. 1, § 1-202;
New York General Construction Law, § 20;*
Michie's Gen. Stat. of North Carolina (1943), Vol. 1, § 1-593; Vol. 2, § 103-5;
North Dakota Rev. Code of 1943, Vol. 1, §§ 1-0215, 1-0305;
Oklahoma Stat. (1941), Tit. 12, § 73;
Page's Ohio Gen. Code Ann. (Lifetime Ed.), Vol. 7, § 10216;
Oregon Comp. Laws Ann. (1940), Vol. 2, § 10-206;
Purdon's Pennsylvania Stat. Ann. (Perm. Ed.), Tit. 46, § 538; Tit. 76, § 172;
Rhode Island: *West* v. *West*, 20 R. I. 464, 40 Atl. 6 (1898);
Code of Laws South Carolina (1942), Vol. 1, § 821;
South Dakota Code of 1939, Vol. 3, § 65.0403;
Williams' Ann. Code of Tennessee (1934), Vol. 1, § 11;
Vernon's Texas Rules of Civil Procedure, Rules 4 and 468;
Utah Code Ann. (1943), Vol. 5, § 88-2-7;
Michie's Virginia Code of 1942 (Ann.), Tit. 2, Ch. 2, § 5, clauses 8-9;
Remington's Rev. Stat. of Washington Ann. (1932), Vol. 2, § 252;
Michie's West Virginia Code (1943), §§ 25, 26;
Wisconsin Stat. (1947), Vol. 2, § 331.23;
Wyoming Comp. Stat. (1945), Vol. 1, § 3-104.

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* See note, p. 11.

Only Maryland, Michigan and Vermont have been found to include generally the last Sunday in the computation of a period of time. See *Winkel* v. *Geiger*, 154 Md. 673, 141 Atl. 345 (1928); *Drake* v. *Andrews*, 2 Mich. 203 (1851); *Rinfret* v. *Tripp*, 97 Vt. 404, 123 Atl. 430 (1924). In New Hampshire, no statute or decision has been found on this question.

The practice of permitting action on a Monday succeeding the final Sunday of a prescribed period of time, which is now almost everywhere followed by the courts, is merely an expression of the universal practice of the business world. For example, all forty-eight states and the District of Columbia have adopted the Uniform Negotiable Instruments Act, Section 194 of which provides:

> "Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day."

### English Rule.

English practice is in accord with the majority of states and federal jurisdictions. Rules of the Supreme Court, Rule LXIV, Order 3 (The Annual Practice, 1946-1947, pp. 1427-1428).

## Conclusion.

The petition for a writ of certiorari should be held to have been timely filed.

Dated: June 2, 1948.

Respectfully submitted,

DANIEL JAMES,
Counsel for Petitioner.

ROBERT G. ZELLER,
Of Counsel.

# In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 781

NEUMATICOS GOODYEAR S. A., PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

**SUGGESTION THAT PETITION WAS FILED OUT OF TIME AND MOTION FOR EXTENSION OF TIME WITHIN WHICH RESPONDENT MAY FILE CONDITIONAL CROSS-PETITION**

The attention of the Court is respectfully invited to the fact that petitioner's motion for a new trial was overruled by the Court of Claims on February 2, 1948, and that the petition for a writ of certiorari was filed with the Clerk of this Court on May 3, 1948. In these circumstances, it would appear that the petition was not filed within three months of the entry of final judgment, as required by Section 8 (a) of the Act of February 13, 1925 (28 U. S. C. 350). It is suggested, therefore, that the petition be dismissed on this ground.

If, however, the Court concludes that the filing was timely, respondent believes that the petition

does not merit review and desires to present formal opposition thereto. In the event this suggestion does not lead to a dismissal of the petition, respondent, which has not yet been served, will submit a brief in opposition to certiorari.

On April 28, 1948, on application of respondent, the Chief Justice entered an order extending the time within which to file a conditional cross-petition from May 2, 1948, to and including June 1, 1948. If the petition for certiorari is dismissed as untimely, respondent will not file a conditional cross-petition and no further extension of time will be needed. If, however, this Court should conclude that the filing is timely, respondent then will desire to file a conditional cross-petition. In these circumstances, the Government respectfully requests that, if the petition be deemed timely, an additional extension of thirty days within which to file a conditional cross-petition, namely, from June 1, 1948, to and including June 30, 1948, be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*

MAY 20, 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948